IN THE SUPREME COURT OF MISSOURI

JOAN JUNGMEYER, GLEN JUNGMEYER, DENNIS KILLDAY, LINDA KILLDAY, TIMOTHY KING, KIM RUIZ-TOMPKINS, ROBERT DUNSTAN, BILL KOEBEL, VIRGIL CLARK, APPELLANTS,

v.

CITY OF ELDON, MISSOURI, RESPONDENT.

Supreme Court No. 95069

Appeal from the Decision and Order of the Western District Court of Appeals,

April 21, 2015 – Western District No. WD77922

RESPONDENT'S SUBSTITUTE BRIEF

Filed by:
INGLISH & MONACO, P.C.
Mark G. R. Warren, #44618
Todd E. Irelan, #61304
237 East High Street
Jefferson City, MO 65101
Phone: 573-634-2522
Fax: 573-634-4526
Email: mwarren@inglishmonaco.c
tirelan@inglishmonaco.com
ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT

This Court is a court of limited appellate jurisdiction. Mo. Const. Art. V, §§ 3 and 10; *Kuyper v. Stone County Commission*, 838 S.W.2d 436,437 (Mo. Banc. 1992). In every case it is incumbent on the Court to determine its jurisdiction before reaching the merits of an appeal. *Alumax Foils, Inc. v. City of St. Louis*, 939 S.W.2d 907, 910 (Mo. Banc. 1997).

This Court has authority to hear this case pursuant to § 10 of the Missouri Constitution and Mo. Sup. Ct. R. 83.04. Article 5 §10 of the Mo. Const. states in relevant part as follows:

> Cases pending in the court of appeals may be transferred to the supreme court by order of the majority of the judges of the participating district of the court of appeals, after opinion, or by order of the supreme court before or after opinion because of the general interest or importance of a questions involved in the case, or for the purpose of reexamining the existing law, or pursuant to supreme court rule. The supreme court may finally determine all causes coming to it form the court of appeals, whether by certification, transfer or certiorari, the same as on original appeal. V.A.M.S. Const. Art. 5 Section 10 (2015).

Mo. Sup. Ct. R. 83.04 states in relevant part as follows:

> If an application for transfer under Rule 83.02 has been denied, the case may be transferred by order of this Court on application of a party for any of the reasons specified in Rule 83.02 or for the reason that the opinion filed is contrary to a previous decision of an appellate court of this state.

Respondent's Motion for Rehearing was denied by the Court of Appeals Western District on June 2, 2015. Respondent then made timely application for transfer to this court on June 17, 2015.

Respondent believes transfer of this matter to this court on August 18, 2015, was appropriate, because the ruling of the Western District Court of Appeals of April 21, 2015, which recognized a Motion to Strike as a response to a Mo. Sup. Ct. R. 74.04 Motion for Summary Judgment is a question of general interest and is in conflict with said rule and the considerable case law of this state, as explained herein.

STATEMENT OF FACTS

A. Appellants filed their initial Petition on April 20, 2011. L.F. 3. In response, Respondent filed its Motion to Dismiss all eight Counts of said Petition on May 20, 2011. L.F. 3. On November 10, 2011, Appellants' Petition was dismissed by Judge Kenneth Hayden, who afforded Appellants 30 days to file an amended Petition. L.F. 5. Appellants filed their First Amended Petition on December 12, 2011. L.F. 5. Respondent's subsequently filed a Motion to Dismiss, which was overruled by Judge Stan Moore, on February 9, 2012. L.F. 5. Respondent then filed its Answer on March 9, 2012. L.F. 6, 50.

B. Discovery has been conducted and after the conclusion thereof, Respondent filed its Motion for Summary Judgment on June 2, 2014. L.F. 81.

C. Appellants did not file a response to Respondent's Motion for Summary Judgment as required by Rule 74.04, but filed a Motion to Strike pursuant to Rule 55.27(e) on July 7, 2014. L.F. 1023.

D. Appellants noticed their Motion to Strike for hearing on July 21, 2014, and the Court heard argument on both the Appellants' Motion to Strike and Respondent's Motion for Summary Judgment on that date. L.F. 13.

E. The Court advised Appellants' counsel during the July 21, 2014, hearing to submit an affidavit to the Court by July 25, 2014, regarding the date upon which Appellants received Respondent's Motion for Summary Judgment. L.F. 13, 1132.

F. Appellant filed the requested Affidavit on July 25, 2014, but also filed Appellants' Motion for Enlargement of Time to File Appellants' Motion To Strike Respondent's Motion for Summary Judgment Or In The Alternative Motion for Enlargement of Time to File Response To Respondent's Motion for Summary Judgment on July 25, 2014. L.F. 1068, 1132.

G. Paragraph 6 of Appellants' July 25, 2014, filing stated that "[u]ncertainty of the propriety of a Motion to Strike being filed in lieu of a response to Respondent's Motion [for Summary Judgment] prompts Appellants to submit a response more in keeping with Rule 74.04(c)(2)." L.F. 1069.

H. Paragraph 6 of that same document also requested "an enlargement of time, to Monday July 28, 2014, to submit a response to Respondent's Motion for Summary Judgment in substantially the same form as Exhibit 2, attached hereto." Appellants did not file a notice setting their July 25, 2014, motion for hearing in conjunction with their July 25, 2015, motion. L.F. 14.

I. On Monday, July 28, 2014, before Appellant filed its proposed response, the Court ruled in favor of Respondent, the City of Eldon, and entered summary judgment in its favor. L.F. 14, Appendix, A1.

J. Appellants then filed on July 29, 2014, a supplement to their July 28, 2014, filing. L.F. 1206.

K. On July 30, 2014, Appellants filed a Motion to Vacate the Judgment and Notice calling up for hearing their previously filed Motion for Enlargement

of Time to File Response to Respondent's Motion for Summary Judgment, which the court denied. L.F. 15, 1226.

L. A First Amended Judgment was entered on August 8, 2014 which altered only the last line of the Judgment of July 28, 2014 by stating at the end of said judgment that all previously filed motions were overruled. L.F. 15, 1262, Appendix, A2.

RESPONDENT'S SUBSTITUTE BRIEF

THE APPEALS COURT RULING OF APRIL 21, 2015,

IS CONTRARY TO THE LAW.

In its opinion of April 21, 2015, the Western District Court of Appeals ("Court") found that a Motion to Strike is a "response" to a motion for summary judgment under Mo. Sup. Ct. Rule 74.04 (Rule 74.04). (Appendix A-54).

It further found that it was error for the trial court to have concluded that Plaintiff's Motion to Strike did not constitute a "response" under rule 74.04 to the City of Eldon's ("City") Motion for Summary Judgment, and that it was error for the trial court to then find the statements in City's Statement of Uncontroverted Material Facts as being admitted by Plaintiff's, resulting in summary judgment being granted to the City. (Appendix A-54).

The Court went on to find that the trial court abused its discretion in denying Plaintiff's motion seeking leave to file their substantive response to City's Motion for Summary Judgment. (Appendix A-57).

Contrary Missouri Appellate Opinions

The appellate court's decision is contrary to previous Western District Opinions including the chief case on which the Court relied in its decision; *Sloss v. Gerstner*. That case states "Rule 74.04(c) dictates a specific format for a motion *and response* in order to clarify the areas of dispute and eliminate the need for the trial or appellate court to sift through the record to identify factual disputes. All facts

must come into the summary judgment record in the manner required by Rule 74.04(c)(1) and (2), that is, *in the form of a pleading containing separately numbered paragraphs and a response addressed to those numbered paragraphs*." *Sloss v. Gerstner,* 98 S.W.3d 893, 898 (Mo. App. W.D. 2003). (emphasis added).

It is also contrary to case law in Missouri which consistently recognizes that a "Failure to respond to the factual allegations in a defendant's motion for summary judgment is an admission of those facts." *Executive Bd. of Missouri Baptist Convention v. Windermere Baptist Conf. Ctr., Inc.*, 430 S.W.3d 274,283(Mo. App. S.D. 2002).

Further, the Court of Appeals opinion is contrary to *Magee v. Blue Ridge Professional Building Co., Inc.*, 821 S.W.2d 839, 843 (Mo. 1991) where the court held that "[w]hen reviewing a Motion for Summary Judgment, the Appellate Court looks not just to the petition, but to all the pleadings, depositions, answers to interrogatories and admissions on file together with the affidavits to determine if there is any material fact issue and that the moving party was entitled to judgment as a matter of law." *Magee v. Blue Ridge Professional Building Co., Inc.*, 821 S.W.2d 839, 843 (Mo. 1991).

The Court's decision regarding the trial court's abuse of discretion is also contrary to the holding in *State ex rel. Webster v. Lehndorff Geneva, Inc.*, 744 S.W.2d 801,804 (Mo. 1988), citing *Shirrell v. Missouri Edison Co.,* 535 S.W.2d 446, 448 (Mo. Banc. 1976) that "Judicial discretion is abused when a trial court's ruling is clearly against the logic of the circumstances then before the court and is

so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration; if reasonable men can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion."

Missouri Courts have consistently held to the standard of "mandatory compliance" *Executive Bd. of Missouri Baptist Convention v. Windermere Baptist Conf. Ctr., Inc.*, 430 S.W.3d 274, 283 (Mo.App. S.D.2014), citing *Wichita Falls Prod. Credit Ass'n v. Dismang,* 78 S.W.3d 812, 814 (Mo.App. S.D.2002), as to the provisions of Rule 74.04; and thus the Court of Appeals should have ruled that the lower court's finding that Appellant's motion to strike was not a "response" as required by Rule 74.04 was correct. If compliance with a rule is found to be mandatory by the courts of this state then filing a response in keeping with the rule is mandatory. By its ruling of April 21, 2015, the Court of Appeals has eliminated mandatory compliance with the Rule, and created an exception which has expanded the Rule to include as a proper response to a motion for summary judgment a motion to strike, and it follows then, other motions or pleadings filed as stand-alone responses to a motion for summary judgment under Rule 74.04, making Rule 74.04 a guideline rather than a rule.

The Court of Appeals also found that the lower court abused its discretion by failing to grant Plaintiffs' motion entitled "Motion for Enlargement of Time to File Plaintiff's Motion to Strike Defendant's Motion for Summary Judgment or In The Alternative Motion for Enlargement of time to File Response to Defendant's Motion

for Summary Judgment" ("motion for enlargement of time"). On page 2 of its opinion, the Appeals Court stated that "when it became clear [to Plaintiffs] that the trial court's ruling on the motion to strike would not occur until after the thirty day deadline prescribed for 'responses' in Rule 74.04, Plaintiffs alternatively filed their motion seeking leave to file a substantive response to City's summary judgment motion in the event their motion to strike was denied." (Material in brackets added). However, Plaintiffs did not file a Notice calling up their Motion until two (2) days after Judgment had been entered and in any event, their Motion for Extension of Time was filed 18 days after Plaintiffs' response to Defendant's Motion for Summary Judgment was due and three (3) days after the hearing on their Motion to Strike and Respondent's Motion for Summary Judgment, which they noticed for hearing.

The Court of Appeals' ruling in this regard is contrary to Mo. Sup. Ct. Rule 44.01 which requires a motion and notice if a request to enlarge time is "made after the expiration of the specified time for taking action." Mo. Sup. Ct. Rule 44.01. See also, *Scottsdale Insurance Company and Wells Trucking, Inc., vs. Addison Insurance Company and United Fire & Casualty Company,* 448 S.W.3d 818, 826 (Mo. Banc. 2014); (lower court did not abuse its discretion in not granting extension of time when it had no motion for extension of time before it.) Given the above, it does not appear the lower court abused its discretion. Here, as noted, notice was not filed until after entry of judgment.

RESPONDENT'S RESPONSE TO APPELLANTS' POINTS RELIED ON I

ARGUMENT

For their response to Appellants' Point Relied On I in the court below, as found here in Appendix 59, Respondent states that the trial court's denial of a Motion to Strike is reviewed for abuse of discretion. *Lero v. State Farm Fire & Casualty Co.*, 359 S.W.3d 74, 79 (Mo.App.W.D. 2011). A trial court's ruling will be reversed "only when it is clearly against the logic of the circumstances and so arbitrary and unreasonable as to shock one's sense of justice and indicate a lack of careful consideration." *Id.*

Respondent did file on June 2, 2014, a Motion for Summary Judgment (Motion), together with Defendant's Statement of Uncontroverted Material Facts in support of Defendant's Motion for Summary Judgment as to all Counts of Plaintiffs' First Amended Petition with an attached copy of all discovery, exhibits, affidavits upon which the motion relies (Statement), L.F. 81 L.F. 109, attached thereto which did state with particularity in separately numbered paragraphs each fact in which Respondent believed there to be no genuine issue of material fact. In its Statement Respondent did specifically refer to the pleadings, discovery, exhibits and affidavits upon which it relied to show there to be no genuine issue of material fact. The discovery, exhibits and affidavits Respondent relied on were attached to the Statement of Uncontroverted facts and a legal memo in support of its Motion for Summary Judgment was also filed therewith, all in keeping with the

mandates of Mo. Sup. Ct. R. 74.04(c)(1). L.F. 84. In their response thereto, Appellants filed a sole Motion to Strike on July 7, 2014. L.F. 1023.

The appropriate rule under which Appellant was to respond to Respondent's Motion for Summary Judgment is 74.04(c)(2) which states:

> (2) *Responses to Motions for Summary Judgment.* Within 30 days after a motion for summary judgment is served, the adverse party shall serve a response on all parties. The response shall set forth each statement of fact in its original paragraph number and immediately thereunder admit or deny each of movant's factual statements.
>
> A denial may not rest upon the mere allegations or denials of the party's pleading. Rather, the response shall support each denial with specific references to the discovery, exhibits or affidavits that demonstrate specific facts showing that there is a genuine issue for trial.
>
> Attached to the response shall be a copy of all discovery, exhibits or affidavits on which the response relies.
>
> A response that does not comply with this Rule 74.04 (c)(2) with respect to any numbered paragraph in movant's statement is an admission of the truth of that numbered paragraph. (emphasis added)

"Rule 74.04 governs motions for summary judgment, and the requirements of Rule 74.04 are mandatory." *Executive Bd. of Missouri Baptist Convention v. Windermere Baptist Conf. Ctr., Inc.*, 430 S.W.3d 274, 283 (Mo.App. S.D.2014), citing *Wichita Falls Prod. Credit Ass'n v. Dismang,* 78 S.W.3d 812, 814 (Mo.App.

S.D.2002). "Failure to respond to the factual allegations in a defendant's motion for summary judgment is an admission of those facts." *Id.,* Citing *Birdsong v. Christians*, 6 S.W.3d, 218, 223 (Mo.App. 1999).

Appellants' filing of a Motion to Strike rather than filing a proper response pursuant to Rule 74.04(c) (2) was simply an inappropriate response to Respondent's Motion for Summary Judgment. Mo.R.Civ.P. 55.27(e) (2014) states that:

> upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within thirty days after the service of the pleading upon any party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.
>
> Appendix, A20.

Appellants' Motion to Strike failed to include any evidence which would show Respondent's Motion contained any "insufficient defense, immaterial, impertinent, redundant or scandalous matter." Mo.R.Civ.P. 55.27(e) (2014). Instead, Appellants' Motion to Strike attempted to label Respondent's Motion for Summary Judgment, Statement of Uncontroverted Material Fact (Statement) and supporting documentation as falling short of Rule 74.04 through incorrect and conclusory statements by Appellants regarding the structure of Respondent's

Motion, Statement and the admissibility of certain of Respondent's exhibits and affidavits.

"A defending party may establish a right to summary judgment by demonstrating: (1) facts negating any one of the elements of the non-movant's claim; (2) that the non-movant, after an adequate period for discovery, has not been able and will not be able to produce sufficient evidence to allow the trier of fact to find the existence of any one of the elements of the non-movant's claim; or (3) that there is no genuine dispute as to the existence of the facts necessary to support movant's properly pleaded affirmative defense." *Goerlitz v. City of Maryville,* 333 S.W.3d 450, 453 (Mo. 2011). In addition, "Once a defendant moving for summary judgment has made a *prima facie* showing of entitlement to summary judgment, the burden shifts to the non-movant, who may not rest upon the mere allegations or denials of his pleading, but whose response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue for trial." *Cross v. Drury Ins., Inc.* 32 S.W.3d 632, 636, (Mo.App.E.D. 2000). "The plain meaning of *Rule 74.04(c)(3)* . . . is that a trial court in deciding whether to grant a motion for summary judgment, should consider only the motion and the response—the only pleadings authorized by *Rule 74.04(c)(1) and (2)*—together with the affidavits, admissions, deposition testimony and documents referred to in these pleadings." *New Prime, Inc. v. Professional Logistics Management Co., Inc.,* 28 S.W.3d 898, 904 (Mo.App. S.D. 2000). "Otherwise a Summary Judgment proceeding could become a blizzard of paper" *Id.* See also *Mcdowell v. Waldron,*

920 S.W.2d 555, 562 (App. E.D. 1996). (The "[R]ule requiring the trial court to rule on a summary judgment motion after the response has been filed or the time for filing the response has expired does not authorize further pleadings, but rather contemplates that the trial court should only consider the motion and the response in deciding whether the motion should be granted.) A "trial court's order granting respondents' motion for summary judgment [that] did not state its reasons for so doing…is presumed to have based its decision on the grounds specified in respondents' motion." Thus, it is clear that a Motion to Strike is not authorized under Rule 74.04.

Appellants' argument which characterizes Respondent's supporting evidence as being inadmissible is also not persuasive. "A motion for summary judgment will not fail merely because some of the statements contained in supporting affidavits may be inadmissible, as a court may look to the remaining portions of the affidavits and pleadings in a case to see if there is a basis to support the summary judgment." *Scott v. Ranch Roy-L, Inc.* 182 S.W.3d 627,636 (Mo.App. E.D. 2005). "When facts are stated in affidavits and exhibits in support of a motion for summary judgment and there are no verified denials, the facts so stated are admitted for purpose of summary judgment." *Waltz v. Cameron Mut. Ins. Co.* 526 S.W.2d 340, 343 (Mo.App. 1975). See also *Hurwitz v. Kohm* 516 S.W.2d 33, 36 (Mo.App. 1974).

As noted above, the Court of Appeals' decision expanded the Rule to include a Motion to Strike as a "response" to a Motion for Summary Judgment. This finding is, however, not in keeping with the holding of the Court in the case upon which the Appeals Court relied. *Sloss v. Gerstner,* 98 S.W.3d 893, 898 (Mo. App. W.D. 2003). "Rule 74.04(c) dictates a specific format for a motion *and response* in order to clarify the areas of dispute and eliminate the need for the trial or appellate court to sift through the record to identify factual disputes. All facts must come into the summary judgment record in the manner required by Rule 74.04(c)(1) and (2), that is, *in the form of a pleading containing separately numbered paragraphs and a response addressed to those numbered paragraphs.*" *Sloss v. Gerstner*, 98S.W.3d 893, 898 (Mo. App. W.D. 2003). (emphasis added). In the proceedings below, Appellants cited *Rasse v. The City of Marshall*, 18 S.W.3d 486, 494 Mo. App. W.D. 2000), *Brown v. Upjohn Co.*, 655 S.W.2d 758, 760 (Mo. E.D. 1983) and *Bakewell v. Missouri State Employees' Retirement System*, 668 S.W.2d 224, (Mo. App. W.D. 1984) apparently to support their contention that they did not need to respond to Respondent's Motion for Summary Judgment in conformity with Rule 74.04(c)(2). These cases however do not support Appellant's position. In *Rasse,* Defendants filed an amended Motion for Summary Judgment in an apparent response to a Motion to Strike filed by the Plaintiff. But what is most noteworthy is that the Plaintiff filed a "90 page response" to Defendant's amended Motion for Summary Judgment, therefore keeping with the Rule. There is no evidence in the Court of Appeals' opinion that

the lower court ever ruled upon Plaintiff's Motion to Strike Defendant's Motion for Summary Judgment. Rather, it appears the Defendants simply filed an amended Motion for Summary Judgment to which Plaintiffs then filed their 90 page response. The Court of Appeals declined to overturn the lower court's grant of partial summary judgment, based, among other things, on the fact that the Defendants filed an amended Motion for Summary Judgment.

In their Motion to Strike Appellants also reference the *Brown* case and state that case contains the following language: "that a plaintiffs' failure to file a response [to a Motion for Summary Judgment] "does not constitute an admission of any alleged statement of fact," and in their brief before the Western District Court of Appeals, Appellants cite *Brown* to support their position that Appellant did not have to file a proper response if Appellant believed evidence referred to in Respondent's Statement of Facts was not, in Appellants' opinion, admissible as evidence. Appellants' Appeals Brief, pg. 17, (material in brackets added). In regard to the *Brown* case, Appellants appear to misquote it. The *Brown* case actually states that Plaintiffs' inaction there "did not constitute an admission of manufacturer's *interrogatory answers as provided for in Rule 74.04(e).*" (emphasis added). *Id.,* at 760. *Brown* does not in fact stand for the proposition that Appellants here were not required to file a proper response pursuant to Rule 74.04 to Respondent's Motion for Summary Judgment. In *Brown,* the Defendant filed an "unverified motion for summary judgment unsupported by affidavit, but accompanied by an exhibit," an exhibit which the opposing party Upjohn had

supplied as part of an interrogatory response. *Id.* The court noted the interrogatories were not used as supporting evidence by Defendant in its motion for summary judgment and therefore were not before the court. Thus, the motion for summary judgment in *Brown* was not supported by evidence and Plaintiff did not have to respond to what did not exist. *Brown* does not stand for the proposition that a proper response to a Motion for Summary Judgment need not be filed.

In *Bakewell*, 668 S.W.2d 224, at page 228 movant filed one affidavit in support of its Motion for Summary Judgment. The non-movant filed Suggestions in opposition to movant's motion. The *Bakewell* court found movant's sole affidavit to be defective, and noted that a party is only "relieved of the burden of presenting facts outside of the pleading allegations when the movant relies *solely* upon a defective affidavit." *Id.*, at 228. (emphasis added). While the *Bakewell* court did mention in footnote three at page 227 of its opinion that neither party "moved to strike or otherwise object to 'the defective affidavits'," the court did not hold that a Motion to Strike obviates the requirement to follow Rule 74.04. (emphasis added). Thus, these cases do not alter the Appellants' obligation to respond to Respondent's Motion for Summary Judgment as required by Rule 74.04(c)(2); they merely make reference to a generic motion to strike, and do not hold that a stand-alone motion to strike under Rule 55.27 (e) is a permitted response under Rule 74.04.

In this action Respondent supported its motion with 13 exhibits, including not only affidavits, but numerous other documents and discovery. For Appellants to avoid the facts contained in Respondent's Motion for Summary Judgment being an admission of the truth of each numbered paragraph in its accompanying Statement of Uncontroverted Fact, Appellant was required to provide a response pursuant to Rule 74.04(c)(2), contradicting the facts put forth by Respondent. Appellants did not do so and, in fact, stated clearly at the conclusion of their Motion that their intent was only to file a Motion to Strike. Appellants' Motion to Strike, pg. 25. L.F. 1047. Therefore, pursuant to Rule 74.04 and the case law explaining the rule, the facts set forth in Respondent's Motion, Statement and affidavits are taken as true, leaving the trial court to determine only if the facts stated in Respondent's Statement and affidavits were sufficient to defeat any one element of Appellants' six counts. Respondents pleading and supporting documents did so demonstrate as explained further below.

Appellants' argument that all of Respondent's Statement is insufficient and that its exhibits do not support Respondent's Motion for Summary Judgment is also mistaken. In their argument to have Respondent's Statement and exhibits stricken, Appellants appear to assume the court's role in their assertion that all of Respondent's Statement is conclusory and its exhibits are inadmissible as being based on hearsay, being irrelevant, improperly certified and unsupported by personal knowledge or otherwise violating Rule 74.04. As mentioned above, "facts contained in affidavits or otherwise in support of a party's motion are

accepted as true unless contradicted by non-moving party's response to summary judgment motion." *Pendergist v. Pendergrass,* 961 S.W.2d 919, 923 (App. W.D. 1998). It was Plaintiffs' responsibility to file a response to contradict Respondent's offered Statement of Facts and supporting evidence. Appellants ignore that while the record cannot be expanded after the filing of a Motion for Summary Judgment, an affidavit, which may be defective, can be supplemented to correct for such a defect, thus making a motion to strike based on a supposedly defective affidavit an inappropriate response to a Motion for Summary Judgment. Respondent could have supplemented any alleged defect in an affidavit should the need have arisen, and because they can be supplemented. The "rule permitting affidavits filed in a motion for summary judgment to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits, by its own terms, gives trial courts discretion to permit only affidavits to be supplemented or opposed, and it does not authorize supplementation of the motion or response." *Cross v. Drury Inns, Inc.*, 32 S.W.3d, 632, 636 (Mo.App.E.D. 2000). It is, therefore, inappropriate for Appellants to conclude these affidavits and other evidence are inadmissible as justification for Appellants' failure to file a proper response pursuant to Rule 74.04. The real issue here is that Appellants have not and cannot now contradict Respondent's statement of uncontroverted facts because of their failure to respond appropriately. Further, Plaintiffs ignore that determinations regarding admissibility are a trial court's responsibility and that numerous principles of law support Respondent's contention that the evidence

Respondent provided is admissible. See, *Goodman v. State Farm Ins. Co.*, 710 S.W.2d 423, 424. (Mo.App. E.D. 1986), ("Statements based on the witness' personal knowledge are not hearsay." and "A statement is admissible if offered not for the truth of the matter asserted but "to establish information in possession,"), *Wood v. Proctor and Gamble Manufacturing Co.* 787 S.W.2d 816, 820 (Mo.App. E.D. 1990), ("certified copies of records referred to in an affidavit are not necessary where the affidavit is based on the affiant's personal knowledge."). Given the trial court sustained Respondent's Motion, it is presumed the court did so based on the record Respondent provided. This would include the evidence Plaintiffs complain of here. Appellants merely conclude unilaterally that Respondent's exhibits and affidavits are inadmissible, but failed to present facts in a proper response to contradict them as Rule 74.04 requires.

RESPONDENT'S RESPONSE TO APPELLANTS' ARGUMENT REGARDING RESPONDENT'S STATEMENT OF UNCONTROVERTED FACTS

Appellants' Motion to Strike specifically addressed only one of Respondent's numbered paragraphs, paragraph one, and did not address it in a manner prescribed for by Rule 74.04(c)(2). It is reasonable to conclude that this paragraph and the evidence used to support it were found by the Court to be sufficient for Respondent's Motion for Summary Judgment. In their Motion to Strike Appellants declared Respondent's use of the phrase "No genuine issue of

material fact exists regarding Plaintiffs' allegations in Paragraph ..." as not proper. This issue is, however, precisely the issue a movant must address in a motion for summary judgment. Appellants go on to state that the uncontroverted fact set out by the City in paragraph 1 of its statement, that "water and sewer funds are not used to fund the general revenues of the City" and that the ordinances at issue are not subject to Hancock, either statutorily or under the relevant case law, is conclusory.

Rule 74.04(c)(1) requires a movant to "state summarily the material facts upon which they rely in support of their motion for summary judgment and support them by reference to the discovery, exhibits and affidavits." Mo.R.Civ.P. 74.04(c)(1) (2015). Appendix, A15. The facts referenced by Appellants were supported by credible evidence which included affidavits of City officials, James Guthrie (Exhibit A), the Waste Water Supervisor, and Steve Johnson (Exhibit B), current Public Works Director, and Eldon City ordinances regarding the water and/or sewer system which predate the Hancock Amendment and references to Missouri law. L.F. 995, 1010. Appellants' failure to respond to this statement as required by 74.04 was then an admission of the facts asserted therein.

Appellants contend that statements made by James Guthrie and Steve Johnson in their affidavits in Exhibits A and B are hearsay and irrelevant. However, Exhibits A and B are not offered as proof of the matter asserted, i.e. that the ordinances are not subject to Hancock. The statements are merely ancillary to

such a contention. They are supporting evidence to show that the water and sewer works were in operation long before Hancock was implemented, and are based on the declarants' personal knowledge derived from information in their possession constituting the basis of their belief.

The City of Eldon, Missouri has provided water and sewer services to the citizens of the City of Eldon since at least 1920 and has at all times relevant to this action continued to operate and maintain said water and sewer works. L.F. 119, Ex. A, Affidavit of James Guthrie, L.F. 122, Ex. B, Affidavit of Steve Johnson L.F. 995, 1020, Ex. K, City of Eldon Ordinances. This evidence supports Respondent's stated fact that the rate increases complained of here are not subject to the Hancock Amendment. Respondent also referenced Section 67.042 RSMo to support this fact and explained in its brief that the "rate a governing body of a municipality is allowed to charge for utilities is not in the nature of taxation, but is in the nature of a bill which is a demand of proprietorship." L.F. pgs. 86, 87. Appendix, A11. See, *St. Louis Brewing Assn. v. St. Louis* 37 S.W. 525, 528. (Mo. 1896).

Therefore, as to the only one of Respondent's numbered paragraphs Appellants referred to in their Motion to Strike, it can be seen that even here Appellants' complaints were not compelling. Given the fact that Appellants' complaints as to the only reference to any of Respondent's numbered paragraphs from its Statement are, at the very least, questionable and given the fact that

Appellants did not address Respondent's facts in their Statement any further, it cannot be said that the trial court's denial of their Motion to Strike was an abuse of discretion such that it was so arbitrary and unreasonable as to "shock ones sense of justice." *Lero*, at 79.

Appellants' rendition on pages 18-28 of their Appellate Brief of Respondent's Statement of Facts wherein Appellants unilaterally strike through Respondent's numbered paragraphs of said Statement represents nothing more than their opinion. Because their opinion was not put in a proper response it was not properly put before the trial court as part of the summary judgment record and therefore it cannot be said the trial court abused its discretion in regard to Appellants' complaints in pages 18 through 28 of their Brief. *Lozano v. BNSF Railway Co.*, 421 S.W.3d 448, 455 (Mo. 2014). If Appellants disagreed with the facts Respondent presented in its Statement of Uncontroverted Material Fact and supported by Respondent's Exhibits A and B, they should have made those arguments in a proper responsive pleading pursuant to Rule 74.04, but did not do so. Instead, in their Motion to Strike Appellants referenced but one of Respondent's numbered paragraphs, failed to provide facts or any evidence that contradicted it and then objected "in toto" to the remaining paragraphs in Respondent's Motion, leaving the trial court with little to consider as to Appellants' Motion to Strike Respondent's Statement.

RESPONDENT'S RESPONSE TO APPELLANTS' ARGUMENT REGARDING RESPONDENT'S EXHIBITS

Having already addressed Exhibit A and B above, Respondent now turns to Appellants' complaints regarding the remaining exhibits. In reference to Appellants' complaints regarding Respondent's Exhibit C, which are Appellants' responses to Respondent's requests for production of documents, issued pursuant to Mo.R.Civ.P. 58.01, Appellants state that Respondent's use of discovery contained in Exhibit C lacks specificity and is incomplete. However Appellants' response to the referenced request for production of documents was that they had no responsive documents to support the allegations in their amended petition. The document requests at issue were specifically referenced by Respondent via question number in Respondent's Statement and each of Appellants' responses relied on was contained in Exhibit C. L.F. 125. Neither Appellants' brief here nor their original motion set out any evidence contrary to Respondent's exhibits, as was Appellants' duty. The simple answer to the referenced discovery questions to Appellants shows they had no responsive documents, and indeed, they offered no evidence to support their allegations that the water and sewer rates are excessive or that the proceeds fund the City's general operations. Respondent's statement specifically referenced the pertinent discovery questions and attached the documents to the statement. L.F. 125. Appellants' answers to Respondent's discovery answers are then specific, not conclusions or otherwise inadmissible.

Appellants' objection to Exhibit D, the Evers and Company audits, must also fail. L.F. 195-451. The records provided are individual audit reports the City of Eldon contracts for and maintains on a regular basis, and were previously provided to Plaintiffs in discovery. These records are properly attached to the Business Record Affidavit of Fran Suttmoller, the current City Clerk. L.F. 125. Appellants' allegation in their amended petition that water and sewer funds were used by the City for general revenue was general and broad. The Evers audits provide a general overview of the financial activity of the entire City, and show no such activity as Appellants allege, which is why each of the complete individual audit reports were provided as an Exhibit. Regardless, all of the records in the exhibits Appellants complain of have been previously provided to Appellants in response to their discovery requests and are therefore not new or a surprise to Appellants. The Exhibit D is as specific as the allegations. Even so, given the fact that the trial court is presumed to have based its opinion on the record, if a portion of an exhibit is inadmissible the remainder of the record may still be considered by the court in its determination. Also, given the fact that the allegation for which this exhibit was provided does not entitle Plaintiffs to relief under this court's opinion in *Arbor Investment v. City of Hermann*, 341 S.W.3d at 673 (Mo. 2011). Plaintiffs' objection to this Exhibit is insufficient to support their contention that the trial court's grant of summary judgment in Respondent's favor was improper. Appellants' arguments regarding Respondent's provision of the Evers audits

simply fail to justify Appellants' failure to properly respond to Respondent's Motion for Summary Judgment.

Appellants also complain of the admissibility of Exhibit E, the affidavit of former City Administrator Debbie Guthrie. Ex. E, Supplemental Record on Appeal, Appendix A-5. Mrs. Guthrie was the individual who maintained the water and sewer accounts, and had personal knowledge of where and what water and sewer rates were collected by the City and how they were used. Her affidavit conforms with Rule 74.04 and states it is based on her personal knowledge and so is admissible as detailed above. *Goodman*, at 424. Appellants complain about paragraph 5 of this exhibit, but their argument would not render the entirety of the exhibit inadmissible and the trial court could properly consider the rest in its determination. *Scott,* 182 S.W.3d 627, 636. Again, any ambiguity in this affidavit could have been corrected by way of supplementation, assuming Appellants' complaints were valid. *Cross,* at 636. If Appellants had or otherwise wanted to dispute Ms. Guthrie's knowledge, they could have deposed her or, at the very least, denied the Statement which utilized her affidavit.

Appellants object to Respondent's use of discovery in Exhibits F, G, and H, in their Motion to Strike. L.F. 452, 624, and 778 respectively. Appellants complain exhibit F, consisting of certain interrogatories, lacks specificity. However, each interrogatory in exhibit F contains the specific interrogatory question referenced. Interrogatory answers can be used at trial. Mo.R.Civ.P. 57.01(e). Appendix A-23. The referenced document is attached to the Statement

of Uncontroverted Material Facts and does not therefore leave Appellants to question which document or questions within that document Respondent was referring. Further, Appellants' brief shows Appellants did not appear to have any difficulty in determining what the interrogatories referenced.

Appellants also complain of specificity as to Respondent's use of Appellants' depositions contained in Exhibit G. L.F. 624. Each reference to Exhibit G includes the name of the deposed Appellant and the page number of the deposed Appellants' transcript upon which Respondent relied. L.F. 109. Appellants' counsel was present at each of these depositions, and the deposition transcripts were available in their entirety, so Appellants argument that Appellants cannot now determine which transcript is being referenced is without merit.

Respondent's Exhibit H contains the profit and loss from rental property schedules from tax records of each Appellant, L.F. 778, because each Appellant made the allegation in their complaint that they had been deprived of the right to "financially gain" from their property and that mobile home park owners lost present and future earnings. L.F. 41. Exhibit H consisted only of the relevant profit and loss rental property tax schedules of the Appellants showing their referenced allegations to be false. L.F. 778-976. All of the documents are relevant and material, and are in fact specific to each Appellant and therefore admissible.

Appellants next complain about Exhibit I, the affidavit of Frank Schoenboom, the City Administrator, and Exhibit L, the affidavit of John Holland,

the Mayor of the City of Eldon at the relevant times regarding Appellants' claims, and Exhibit J, the affidavit of Fran Suttmoller, current City Clerk of the City of Eldon. L.F. 977, 1009, and 988 respectively. Each of the affidavits are again based on the personal knowledge of the respective affiants and are therefore arguably admissible; *Goodman,* at 424; if some portion were subject to correction or modification, it could be supplemented or the remainder of the affidavit could be taken in evidence and used by the Court in its determination of Respondent's Motion for Summary Judgment. *Cross,* at 636, *Scott* at 636. If the city personnel in charge of and involved in implementation of the ordinances at issue and the city finances cannot testify as to how the events at issue actually transpired, Respondent is at a loss to determine who could. Appellants also summarily dismiss the statements in these exhibits as opinion and conclusory. However, because these affidavits were based on the personal knowledge of the affiant regarding the facts presented, no supporting documents were required to be filed with these affidavits. *Wood*, at 820. Appellants' duty was to file a proper response under rule 74.04 to refute these statements, but Appellants failed to do so. Therefore, the trial court could take those statements as being true, as set out in Rule 74.04 (c) (2).

Appellants also assert that Exhibit J, the affidavit of Fran Suttmoller, does not include a statement that Fran Suttmoller is the City Clerk for Eldon, but it does. L.F. 989. The remainder of Appellants' complaints regarding Exhibit J are simply Appellants' opinion and should have been addressed in a proper response.

This exhibit is based on her personal knowledge and so arguably competent and admissible evidence. *Goodman,* at 636. Finally, Appellants' complaints regarding Exhibit M concerning Ordinances of the City of Eldon could easily have been supplemented to include the seal of the City in a reply by Respondent. *Cross,* at 636.

CONCLUSION

In conclusion, Appellants' Motion to Strike is, and was, an inappropriate response under Rule 74.04. Thus, all the facts in Respondent's Motion and accompanying documents and exhibits are, pursuant to Rule 74.04 (c) (2) and Missouri law, admitted as the truth of that number paragraph. *New Prime*, supra. at 904. Respondent's Motion thus showed Respondent was entitled to summary judgment since Respondent's motion defeats at least one element of each of Appellants' claims, and the Court entered judgment accordingly. Appellants' complaints regarding Respondent's statement and exhibits were and are arguable as to their use in support of Respondent's Motion for Summary Judgment. Therefore, it cannot be said that the court abused its discretion in denying Appellants' Motion to Strike. The requirements of Rule 74.04 are mandatory. *Wichita Falls Production Credit Ass'n v. Dismang*, 78 S.W.3d 812, 814 (Mo. App. S.D. 2002). Failure to comply renders the facts stated by the Respondent being taken as true by the lower court. *New Prime*, supra. at 904. The cases Appellants cite do not support their contention that a Motion to Strike is a proper response

under Rule 74.04. Rule 74.04 and the overwhelming weight of case law required the lower Court to find as it did. The lower Court is not required to state why it ruled as it did and it is presumed the Court relied on the pleadings and exhibits in support of its decision. *McDowell*, supra. at 562. Therefore, the ruling of the lower Court's granting summary judgment and denying Appellants' Motion to Strike as not being a proper response was consistent with Rule 74.04, the law and was not an abuse of discretion and should be affirmed.

Additionally, the matters Appellants raise in their Motion to Strike do not fall under the purview of Missouri Supreme Court Rule 55.27(e) because they are not "redundant, immaterial, impertinent, or scandalous matter." Appellants' complaints in their Motion to Strike are also premature as Respondent could have supplemented its affidavits or dealt with Appellants' issues in Respondent's Reply Brief had Appellants filed a proper response pursuant to Rule 74.04. Assuming arguendo, even if parts of Respondent's evidence could be inadmissible, the remaining portions could still be received into evidence and used by the trial court in its ruling and it is presumed that the court did rely upon the pleadings and exhibits in entering its judgment. *McDowell*, supra. at 562; *Scott*, supra. at 636. Appellants' duty to respond with a proper response in keeping with Rule 74.04 cannot be relieved by a Motion to Strike. Given the above, it is reasonable for the lower court to have decided, as it did, to deny Appellants' Motion to Strike as improper and it cannot be said it was an abuse of discretion to do so. Appellants'

Point I should accordingly have been denied by the Western District Court of Appeals.

RESPONDENT'S RESPONSE TO APPELLANTS' POINT RELIED ON II

ARGUMENT

For their response to Appellants' Point Relied On II in the court below, as found here in Appendix 61, Respondent states that a trial court's ruling is reviewed "for abuse of discretion." *Inman v. St. Paul Fire & Marine Ins. Co.,* 347 S.W.3d 569, 575 (Mo.App. 2011). "A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Id.* Further, "if reasonable persons could differ as to the propriety of the trial court's action, there is no abuse of discretion." *Id.*

Appellants argue in their second point relied on in the court below that the trial court erred in denying Appellants' Motion for Extension of Time to File a Response to Respondent's Motion for Summary Judgment. However, it is clear from documents filed by Appellants that Appellants intent was to file and proceed with a Motion to Strike in response to Respondent's Motion for Summary Judgment. L.F. 1047. In addition, Appellants' Motion for Enlargement of Time was incomplete, and was not filed as a completed pleading until after the court had entered judgment in favor of Respondent. Further, Appellants filed said document out of time and did not notice the same for hearing until July 30, 2014, two days after judgment for

Respondent had been handed down. L.F. 1135. Appendix, A-1, A-3. The position Appellants set out at their Point II also does not rise to the level of "excusable neglect."

Mo. Sup. Ct. Rule 44.01(b) provides as follows:

> Enlargement. When by these rules or by a notice given thereunder or by order of the court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon notice and motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect;.... Mo. R. Civ. P. 44.01(b). Appendix, A-26.

Excusable neglect has been defined as:

> A failure—which the law will excuse—to take some proper step at the proper time (especially in neglecting to answer a lawsuit) not because of the party's own carelessness, inattention, or willful disregard of the court's process, but because of some unexpected or unavoidable hindrance or accident or because of reliance on the care and vigilance of the party's counsel or on a promise made by the adverse party.

Inman, at 576. Here, it is obvious from Appellants' own filings and documents that Appellants' original intention was to file a Motion to Strike. L.F. 1023. It was not until July 25, 2014, some 23 days after the period to properly respond had expired and after their noticed hearing on their Motion to Strike and Respondent's Motion for Summary Judgment, that Appellants filed their Motion for Enlargement of Time to File Their Motion to Strike or in the Alternative Motion for Enlargement of Time to File Response to Defendant's Motion for Summary Judgment seemingly in an attempt to properly respond under Rule 74.04. This document, however, did not follow the requirements of the Rule for a proper response because it was incomplete and largely referred to a document Appellants intended to file on July 28, 2014. L. F. 1070. The document Appellants finally filed on July 28, 2014, titled "Motion for Enlargement of Time to File Plaintiffs' Motion to Strike Defendants Motion for Summary Judgment or in the Alternative Motion for Enlargement of Time to File Response to Defendants Motion for Summary Judgment" was filed after the court's Judgment granting Summary Judgment to Respondent as to all Appellants on all counts. Appellants then supplemented their filing on July 29, 2014, and filed a notice to call it up for hearing on July 30, 2014, to be heard on August 11, 2014. L.F. 15. Appellants' untimely and improper attempt to comply with the Rule however, fell short as to form and content of a proper response because, among other things, it does not controvert each statement of fact in separately numbered paragraphs or present

evidence to contradict those facts set forth by Respondent in Respondent's Motion for Summary Judgment.

Even though Appellants' pleadings referenced above were made in an untimely effort to comply with Rule 74.04 and were effectively made after the court had entered judgment, Appellants now argue that the trial court abused its discretion in denying them an enlargement of time because their action in not properly responding to Respondent's motion as set out in Rule 74.04 constitutes excusable neglect. Similarly to the Appellants in the *Inman* case which Appellants reference in their Brief, Appellants here present no evidence to substantiate excusable neglect. Appellants largely recite only boilerplate language that their failure to file a proper response was "excusable neglect" due to the Appellants' postulation of the "near impossibility of providing a response"... "in strict accordance with Rule 74.04(c)(2) to Respondent's motion." Appellants' Appeals Brief pg. 57.

Respondent disagrees with Appellants' contention as it fails to see the "near impossibility" of simply listing each of the statement of facts, answering same with an admission or denial pursuant to Rule 74.04, and then referencing the record in support. In addition, after judgment was handed down by the trial court, Appellants were somehow able to overcome this "impossibility" and did file a document more in keeping with the rule. There is no allegation of an "unexpected or unavoidable hindrance or accident" and the record does not "unequivocally demonstrate" the failure of Appellants to file a proper response was the "result of

excusable neglect." *Inman*, at 576. Further, as previously stated, Appellants did not even call up for hearing their motion until after judgment had been entered by the trial court, rendering the filing moot. Also, because Appellants' motions were not called up for hearing prior to the lower court's judgment, the lower court had nothing before it upon which it could rule. See, *Scottsdale Insurance Company and Wells Trucking, Inc. vs. Addison Insurance Company and United Fire & Casualty Company,* (Mo. Banc. 2014), WL6958157, (Lower court did not abuse its discretion in not granting extension of time when it had no motion for extension of time before it). Appellants' point II therefore should have been denied by the Western District Court of Appeals.

RESPONDENT'S RESPONSE TO

APPELLANTS' POINT RELIED ON III

ARGUMENT

For their response to Appellants' Point Relied On III in the court below, as found here in Appendix 62, Respondent states that "Appellate review of the grant of summary judgment *is de novo*." *Premier Golf Missouri, LLC v. Staley Land Co., LLC,* 282 S.W.3d 866, 871 (Mo.App. W.D. 2009). "The record below is reviewed in the light most favorable to the party against whom summary judgment was entered, and that party is entitled to the benefit of all reasonable inferences from the record." *Id.*

"Summary Judgment is appropriate when the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law." *Roberts v. BJC Health System*, 391 S.W.3d 433, 437 (Mo. 2013). A Defendant can establish it "is entitled to summary judgment by showing:

1. Facts negating any one of the claimants elements necessary for judgment; (2) That the claimant, after an adequate period of discovery, has not been able to - and will not be able to produce evidence sufficient to allow the trier of fact to find the existence of one of the claimants elements; or (3) Facts necessary to support his properly pleaded affirmative defense." *Id.* at 437.

"A *prima facia* case for Summary Judgment can be established by showing undisputed facts that negate *any one* of Plaintiffs *required proof elements.* If the defending party does negate one of Plaintiffs required proof elements, it establishes a right to judgment as a matter of law for the defending party." *Ressle v. Clay County*, 375 S.W.3d. 132, 141 (Mo.App.W.D. 2012), citing, *State ex rel Nixon v. Hughes,* 281 S.W.3d 902, 906 (Mo.App. 2009) (emphasis in original).

In this matter the trial court did not err in rendering summary judgment in Respondent's favor on any of Appellants' Counts I through VI, because Respondent negated at least one of Plaintiffs required proof elements and was therefore entitled to judgment as a matter of law.

COUNT I

In Count I of their Amended Petition, Appellants allege the city raised its water and sewer rates in violation of the Hancock amendment. These rates are not subject to Hancock and therefore summary judgment in Respondent's favor was proper. Even if these rates were to be reviewed for a violation of Hancock Respondent put forth undisputed facts that showed these rates did not violate Hancock, therefore establishing summary judgment in Respondent's favor.

Not all revenue increases by a local government, whether user fees or tax fees, are subject to the Hancock Amendment. *Seaton v. City of Lexington,* 97 S.W.3d 72, 75 (Mo.App.W.D. 2002). Under Section 250.231 RSMo., the City operating a water works or sewer system shall have all of the powers necessary and convenient to provide for the operation, maintenance, administration and regulation of a waterworks and sewer system, including the right to establish, make, and collect charges which may be in addition to those charges which may be levied and collected for maintenance, repair and administration, including debt service expenses. Section 250.231, RSMo (2010). Appendix, A-8

Additionally, Section 88.773 RSMo provides that the board of aldermen may also erect, maintain and operate waterworks for the city, and may regulate the same and may prescribe and regulate the rates to charge to private consumers of water furnished from such waterworks. Section 88.773 RSMo. 2013. Further, any increases in such a fee are not considered an increase for the purposes of the Hancock Amendment according to Section 67.042 RSMo.

Section 67.042 RSMo.states:

> The term increasing as used in Section 22 of Article X of the Constitution of the State of Missouri when referring to any license or fee of any county or other political subdivision does not mean adjustments in the level of any license or fee necessary to maintain funding of a service, program or activity which is in existence on November 4, 1980, or which was approved by a vote of the people subsequent to November 4, 1980....,

Section 67.042, RSMo. 2010, Appendix, A-11, A-31

Because the sewer and water works system predates November 4, 1980, an increase in the user fee for this service is not subject to Article 10, §22. Appendix, A-11, A-41-43.

Further, in the Missouri Supreme Court decision in *Arbor Investment v. City of Hermann*, 341 S.W.3d at 673 (Mo. 2011) the Missouri Supreme Court noted that a municipality need not base its rates for providing a service on "its precise cost" of providing that service. It went on to state that simply because a "political subdivision charges a fee in excess of the cost of providing the service, no matter how slight the excess," the fee does not automatically become a tax. *Id.*, at 686. The court in *Arbor* went on to state that "when a political subdivision provides a service in exchange for a fee, how much to charge for that service is ordinarily a matter left to the elected local leadership and that Section 22(a) of the Hancock Amendment is not meant to displace user fee exactions...." *Id.*, at 687,

citing *Keller v. Marion County Ambulance District,* 820 S.W.2d 301, (Mo. Banc. 1991), Appendix, A-31, and that "whether the amount charged otherwise is appropriate or inappropriate as a matter of public policy is a matter for the voters and their elected representatives, not the courts." *Id.,* at 687.

Even if these rates are reviewed for a Hancock violation the record before the trial court demonstrated the charges Appellants complain of to be a fee. To determine if a charge is a user fee or a tax the court utilizes the five factors set out in *Keller v. Marion County Ambulance District,* 820 S.W.2d, 304 (Mo. Banc. 1991). Those five factors are as follows:

1) When is the fee paid? – Fees subject to the Hancock Amendment are likely due to be paid on a periodic basis while fees are not subject to the Hancock Amendment are likely due to be paid only on or after provision of a good or service to the individual paying the fee.
2) Who pays the fee? – A fee subject to the Hancock Amendment is likely to be blanket-billed to all or almost all of the residents of the political subdivision while a fee not subject to the Hancock Amendment is likely to be charged only to those who actually use the good or service for which the fee is charged.
3) Is the amount of the fee to be paid affected by the level of goods or services provided to the fee payer? – Fees subject to the Hancock Amendment are less likely to be dependent on the level of goods or services provided to the fee payer while fees not subject to the Hancock

Amendment are likely to be dependent on the level of goods or services provided to the fee payer.

4) Is the government providing a service or good? – If the government is providing a good or a service, or permission to use government property, the fee is less likely to be subject to the Hancock Amendment. If there is no good or service being provided, or someone unconnected with the government is providing the good or service, then any charge required by and paid to a local government is probably subject to the Hancock Amendment.

5) Has the activity historically and exclusively been provided by the government? – If the government has historically and exclusively provided the good, service, permission or activity, the fee is likely subject to the Hancock Amendment. If the government has not historically and exclusively provided the good, service, permission or activity, then any charge is probably not subject to the Hancock Amendment. *Keller*, at 304.

These factors show that the charges complained of here are a fee and not a tax. First, the fee is billed periodically after the City has provided the service. L.F. 452, Appendix, A-5. Supplement Legal File, Ex. E. Affidavit of Deborah Guthrie. This factor under a *Keller* analysis is in the City's favor. Second, the fee is billed only to those who actually use the goods or service for which the fee is charged which, again, is in the City's favor. Appendix A-5. Supplemental Legal

File, Ex. E, Affidavit of Deborah Guthrie. Third, a portion of the fee is based on the level of goods and services provided to the fee payor. L.F. 999, 1001. Appendix, A-5, Supplemental Legal File, Ex. E, Affidavit of Deborah Guthrie and L.F. 452, question #10. Again, this factor is in the City's favor. Fourth, the service has been historically provided by the City, which is, again, in favor of the City. L.F. 119, Ex. A, Affidavit of James Guthrie; L.F. 122, Ex. B, Affidavit of Steve Johnson. Fifth, the activity has historically and exclusively been provided by the City, making this factor arguable as to whose favor it lies. L.F. 119, 122. Taken together, at least four of the five *Keller* factors are in favor of the City. The facts supporting this determination were unchallenged by Appellants in a proper response and were therefore admitted by them as true. These facts demonstrate the water/sewer charges to be a fee. Therefore, even if Section 67.042 RSMo. was ignored, because the water and sewer fees are not a tax under a *Keller* analysis, and because the City does not have to charge its precise cost of providing services, the City has demonstrated it is entitled to Summary Judgment as to Appellants' Count I as a matter of law and the ruling of the trial court should have been affirmed by the Western District Court of Appeals.

Appellants also failed to present a response showing any facts that stand for the proposition that the fees for water and sewer service which were given effect by the complained of ordinances are really taxes in disguise which would warrant a Hancock analysis or which would defeat Section 67.042 RSMo.

Further, Appellants were provided a statutorily prescribed method to dispute the fees as a tax and collect as a refund those amounts that might have been overpaid through Section 131.039 RSMo. Appendix, A-12. Appellants failed to utilize this statutory prescribed dispute process and therefore lack standing to pursue this count in their action on the basis the fees are a tax. As a result, the trial did not err in granting Summary Judgment in favor of Respondent, City of Eldon, as to Appellants' Count I.

COUNT II

Respondent is entitled to Summary Judgment as to Count II of Appellants' First Amended Petition for injunctive relief because Appellants have an adequate remedy at law via taxpayer protest under Section 139.031 RSMo, have not suffered irreparable harm, and also because mobile home parks are included within the scope of the Eldon City Code provisions concerning utility services. Appellants allege at Count II of their Petition that they are entitled to injunctive relief because the ordinances at issue do not specifically include mobile home parks and, as such, mobile home parks are not multi-residential properties such that they fall under the ordinances at issue here. "An injunction is an extraordinary and harsh remedy, which should not be employed where there is an adequate remedy at law." *McDonald v. City of Brentwood 66* S.W.3d 46, 49 (Mo.App.E.D. 2001). "The requisite elements for a permanent injunction are 1.) Irreparable harm and 2.) No adequate remedy at law." *City of Greenwood v. Marlin Marietta Materials, Inc.,* 311 S.W.3d 258, 265 (Mo.App.W.D. 2010). "An

indispensable requirement for obtaining injunctive relief is the wrongful and injurious invasion of some legal right existing in the Plaintiff." *Supermarket Merchandising and Supply, Inc. v. Marschuetz,* 196 S.W.3d 581, 585 (Mo.App.E.D. 2006). Mandatory injunction directing undoing of that which has been done may not be granted on doubtful proof; it can be granted only when the right thereto is clearly established." *Id.* "Plaintiffs who seek a mandatory injunction requiring undoing of an act carry a very heavy burden of proof." *Cook v. Rupp,* 565 S.W.2d 833, 837 (Mo.App. 1978). "Irreparable harm sufficient for injunctive relief is established if monetary remedies cannot provide adequate compensation." *Glenn v. City of Grant City,* 69 S.W.3d 126, 130 (Mo.App.W.D. 2002).

Appellants have provided no evidence that they will suffer irreparable harm. In fact, a review of their tax documents regarding income and loss from their rental business shows that Appellants continue to derive income from the properties they complain are affected by the ordinances and that this income or loss is at or near the same levels they were before the ordinances went into effect. These documents were attached to Respondents Statement of Uncontroverted Material Fact. L.F. 778-976. Further, all Appellants testified that either rents were raised to cover increased rates or their tenants are responsible for water and sewer works bills clearly placing the burden of paying said bills on the tenant. L.F. 624, Depo. King, pg. 14, Glen Jungmeyer, pg. 10, Ruiz-Thompkins, pg. 12, Dennis Killday, pg. 24, Linda Killday, pgs. 7-8, Virgil Clark, pg. 23, Dunstan, pg. 8.

Appellants' claims are conclusory and not supported by the facts. Appellants did not file a response denying Respondent's Statement. Therefore the facts referenced herein were admitted for the purposes of Respondents Motion and the trial court properly entered summary judgment in Respondent's favor.

In addition Ordinance 2010-54 defines multi-residential as apartment complexes, duplexes, condominium buildings, etc.; Ordinance 2010-55 defines multi-residential as apartment complexes, condominium buildings, etc.; and Ordinance 2156 is a general ordinance of the City regarding meters. L.F. 995. Classification of users is found elsewhere in the City Code. Section 700.010(6) RSMo relating to manufactured homes defines a manufactured home as "...designed to be used as a dwelling...." Appendix, A-49. Also, Section 715.030(2) of the Eldon City Code states:

> "Master metered shall mean any multiple residential dwelling units e.g., apartment buildings and trailer courts, which are not individually metered for water service and are users of the City's sewage treatment works." L.F. 1020, Appendix, A-45. (emphasis added).

This language clearly includes mobile home parks within the definition of multi-residential dwellings making them subject by reference to the complained of ordinances. Neither ordinance 2010-54, 2010.55, nor 2010.56 states that the listings of multi-residential properties in those ordinances is exclusive or limiting, nor does either ordinance state that any type of dwelling or arrangement of

dwellings (e.g., a mobile home park) not specifically listed is thereby excluded. Appendix A-36, A-37, A-34. Not all of the Appellants own mobile home parks. Therefore, the Appellants who do not own mobile home parks, Appellants Glen and Joan Jungmeyer, Kim Ruiz-Thompkins, Robert Dunstan, and Bill Koebel do not have standing as to this Count as a matter of law, and Respondent is entitled to Summary Judgment as to these Appellants on this Count. In regard to Appellants who do own mobile home parks, Appellants cannot establish, and have not established, that mobile home parks are not included within the ordinances as they are clearly included by reference to multi-residential dwellings in the allegedly offending ordinance of 2010-54 and the existing subsection of the Eldon Code defining this term at §715.030(2). Both ordinances at issue apply to multi-residential properties, and a mobile home park is no different than a multi-residential apartment complex which has separate units that are all part of the same complex; both are included within the definition of multi-residential in the Eldon City Code. L.F. 1020.

Not only have they not suffered irreparable damage, Appellants have an adequate remedy at law.

Pursuant to Section 139.031 RSMo. any tax payer may protest a tax assessed against them and the disputed portion of said tax shall be set aside by the Collector into a separate fund and then the taxpayer must file a Petition to collect those funds from the Collector within ninety (90) days of filing his protest. Section 139.031 RSMo. (2010). Appendix, A-12. Trial on an action based on

Section 139.031 shall be in the manner presented for non-jury civil proceedings, and, after determination of the issues, the Court shall make such orders as may be just and equitable to refund to the taxpayer all or any part of the taxes paid under protest together with any interest earned thereon Section 139.031.4 RSMo. (1999).

Appellants have not filed any formal protests under Section 139.031.4, but this does not change the fact that Section 139.031 provides an adequate remedy at law providing adequate monetary relief. Further, Appellants have five (5) additional Counts that, if substantiated, provide an adequate remedy at law. As Appellants have suffered no irreparable harm and have an adequate remedy under their remaining Counts and Section 139.031 RSMo., Summary Judgment in favor of the City for Appellants' Count II was therefore proper.

COUNT III

Respondent was also entitled to Summary Judgment as a matter of law as to Appellants' Count III, which alleged a regulatory taking in violation of the Fourth and Fifteenth Amendments of the U.S. Constitution. Respondent is entitled to Summary Judgment because the ordinances complained of and their associated rates cannot be characterized as a physical invasion of property; Appellants have no protected property interest in the City's utility rates and Appellants' allegations of diminution in value of property are insufficient to establish a regulatory taking. Further, the ordinances are a valid exercise of the City's police power and serve the legitimate interest of providing for the public health and safety.

Appellants claim the ordinances at issue amount to a regulatory taking by the Respondent. "A regulatory taking occurs when a regulation enacted under the police power of the government goes too far." *Glenn v. City of Grant City*, 69 S.W.3d 126,130 (Mo.App.W.D. 2002). "However, it has long been settled in this state that the valid exercise of the police power is not a taking." *Id.*, at 132. "There are two situations where a landowner is entitled to compensation for a per se regulatory taking: (1) when a regulation causes an actual physical invasion of property; and (2) when a regulation denies all economically beneficial or productive use of land." *Id.* "Missouri Courts use the same factors followed by the U. S. Supreme Court in determining whether a regulatory taking has occurred. Those factors are: (1) the economic impact of the regulation; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government action." *Id.*, at 131. "The valid exercise of the police power is not a taking of private property for public use." *Id.*, 132. "The test" of the exercise of police power is "reasonableness." *Id.*

"Determining the extent of a regulation's economic impact, for purposes of deciding whether particular governmental action has effected a taking, is resolved by focusing on the uses the regulations permit." *Reagan v. County of St. Louis*, 211 S.W.3d 104, 108 (Mo.App.E.D. 2006). Mo. Const. Art. 1 26. (emphasis added). "A government regulation is more apt to constitute a compensable taking when the interference with property can be characterized as a physical invasion by the government, as opposed to a regulation that merely affects property interests

by adjusting the benefits and burdens of economic life to promote the public good." *Reagan,* at 110. Landowner expenditures on property such as Appellants allege here have not been found to be reasonable investment-backed expectations within the context of the takings clause. *Id.* Diminution in property value alone also does not establish a taking. *Id.* at 108.

The evidence in this matter shows that all of the Appellants still own and operate both residential and commercial rental property in Eldon and that they continue to derive similar profits and losses in regard to these properties as existed prior to the enactment of the ordinances which they complain. L.F. 452, Ex. F, Appellants Answers to Interrogatory Question 3 and 3A, L.F. 624-777, Deposition pages King 59-63; Dennis Killday 26-32; Virgil Clark 33, Kim Ruiz-Thompkins 19-22; Linda Killday 10-15; Joan Jungmeyer 41-49; and Glen Jungmeyer 41-49. L.F. 778-976, Ex. H Appellants IRS Profit /Loss from Rental Property Schedules. The Appellants pass the cost of the water and sewer to their tenants. L.F. 624-777, Ex. G, Depositions of King, page 14, Glen Jungmeyer, page 10, Ruiz-Thompson page 12, Killday, page 24, Linda Killday, pages 7-8, Clark, page 23, Bill Koebel, pages 11-14, Dunstan, page 8. Thus, Appellants' claims do not fall within the category of a per se taking as set out in *Glenn* or *Reagan*. Appellants make only conclusory, unsupported allegations to support their Count III and these allegations are only that their damages are an alleged decrease in property values, and that they have to pay excessive fees. Both of these contentions have been found in the State of Missouri to be insufficient to support a regulatory taking, and

Appellants' own testimony and discovery responses refute their allegations. There has been no physical taking of Plaintiffs' property by the City and all the property of Plaintiffs continue to provide Plaintiffs income at or near the same level they enjoyed prior to the enactment of the ordinances at issue. L.F. 778. Therefore, the properties continue to have value as residential and/or commercial property.

The use of Plaintiffs' property is in no way altered by the ordinances. L.F. 995. Appendix, A-34, A-36, A-39. Plaintiffs still maintain their property as rental property and receive income from the property. The ordinances at issue in this lawsuit do no more than adjust the burdens of economic life. *Reagan* at 109. Appellants' claims, therefore, do not fall under either of the standards for there to be a taking under *Glenn* or *Reagan* and therefore, the Respondent was entitled to Summary Judgment in its favor as to Appellants' Count III because there is no genuine issue of material fact as to any element necessary to establish a regulatory taking. Thus, the trial court did not err in entering summary judgment in Respondent's favor.

COUNT IV

Appellants' Count IV alleging violations of due process under the Missouri Constitution also fails because Appellants have no protectable interest in the City's water and sewer rates and the City's interest in maintaining a sanitary condition outweighs the Appellants' interest. "The test to determine whether or not a claim for procedural due process has been stated to have two elements; 1) whether or not the individual interest in question is a protected interest in

accomplishment of the scope of life, liberty or property under the Fourteenth Amendment, and 2,) if no such interest is found the test stops there." *State ex. rel. Jackson County v. Public Service Commission* 532 S.W.2d 20, 31 (Mo. Banc. 1975). "However, if resolved otherwise, the second phase calls for balancing the competing interest of the state and the individual." *Id.* "Consumers of a utility have no property interest in existing rates which is protected by the Fifth and Fourteenth Amendments." *Id.* It follows, then, that because the Appellants have no property interests in the utility rates that are protectable under a procedural due process claim, the Appellants' due process claim must fail at the first stage of the analysis and that the trial court did not err in granting Respondent City of Eldon Summary Judgment in its favor as to Appellants' Count IV.

Even if the analysis was continued under *State ex rel. Jackson Co.*, it still does not follow that the trial court erred in its ruling in Respondent's favor. Missouri courts have found that an ordinance enacted pursuant to the valid police power of a municipality is presumed valid and the party challenging the ordinance has the burden of proving its invalidity. *Bezayiff v. City of St. Louis,* 963 S.W.2d 225, 229 (Mo.App.E.D. 1997). Restrictions on property which promote the health, safety, morals or general welfare are viewed as permissible governmental action even when prohibiting the most beneficial use of property. *Schnucks Markets, Inc. v. City of Bridgeton*, 895 S.W.2d 163, 168 (Mo.App.E.D. 1995). To determine whether an ordinance is enacted pursuant to a legitimate exercise of police power, the court considers whether the expressed requirements of the ordinance have a

substantial and rational relationship to the health, safety, peace, comfort, and general welfare of the inhabitants of the municipality. *Id.* If an ordinance is enacted pursuant to valid police power under this test, the ordinance is presumed valid. *Id.*

Water and sewer rates which provide for the service, maintenance and upkeep of the City's water and sewer service clearly have a substantial relationship to the health, safety, peace, comfort and general welfare [of Eldon's] inhabitants. *Bezayiff,* at 229. Several Appellants recognize the benefit of the water and sewer service in their depositions. L.F. 624, Deposition, pages, King 24; Kim Ruiz-Thompsons 12, and Koebel 16. The rate increases in the complained of ordinances are necessary for the operation and upkeep of the City's water and sewer service. L.F. 123, 978, 1010. The City of Eldon has legitimately exercised its police power regarding public health and safety through the enactment of the complained of ordinances in order to continue to provide the City's water and sewer service. The loss of such service would clearly result in an unsanitary condition in the City of Eldon and would be detrimental to the public's health, safety, peace, comfort and general welfare. The rates are partially based on usage used L.F. 999, 1001, Ex. E, Supplemental Legal File, Affidavit of Deborah Guthrie, Appendix, A-5, and because the rates are directly tied to the service they are reasonably related to that service. Therefore, the rates enacted by the complained of ordinances bear a rational relationship to a legitimate public interest and are therefore valid. Appellants allege no facts otherwise and provided no

response to Respondent's Motion for Summary Judgment refuting any of Respondent's assertions regarding this Count that would warrant a different finding. As a result, the trial court did not err in granting Respondent City of Eldon Summary Judgment in its favor as to Appellants' Count IV.

COUNT V

Appellants' Count V claiming an equal protection violation of Article I Section 2 of the Missouri Constitution is without merit because the ordinances at issue do not create a suspect classification or impinge on a fundamental right and if there were such a classification, it bears a rational relationship to a legitimate state interest. *Mullenix - St. Charles Properties, L.P. v. City of St. Louis,* 983 S.W.2d 550, 559 (Mo.App.E.D. 1998). In considering equal protection claims, a court first looks to see if the legislation creates a suspect classification or impinges on a fundamental right. *Id.* at 559 citing *Casualty Reciprocal Exchange v. Missouri Employers Mut. Ins. Co.,* 956 S.W.2d 249, 256 (Mo. Banc. 1997). "A suspect classification is one whose purpose or effect is to create classes, such as those based on race, national origin, or illegitimacy which, because of historical reasons, command extraordinary protection in a government by the majority." *Id.* at 559. "A fundamental right under this analysis is a right explicitly or implicitly guaranteed by the constitution such as the rights to free speech, to vote, to travel interstate, as well as other basic liberties." *Id.*

Here, Appellants are not members of a suspect class and do not claim they have been denied a fundamental right. Legislation that does not create a suspect

classification or impinge upon a fundamental right will withstand an equal protection challenge if the classification bears some rational relationship to a legitimate state purpose. *Id.,* Citing *Mahoney v. Doerhoff Surgical Services*, 807 S.W.2d 503 at 512; see also *Casualty Reciprocal Exchange,* 956 S.W.2d at 257. Thus, to prevail, the challenger has the burden to show that a legislatively created classification is not rationally related to a legitimate state purpose. *Id.*

There is a rational basis for treating each unit of an apartment complex as any other residential unit. As noted by the court in *Mullenix:*

> An apartment house is an aggregation of dwellings. The rate charged a family living in a multi-family dwelling should be essentially the same as that charged a family occupying a residence. It seems entirely reasonable to adopt a classification which takes account of the ultimate consumer, rather than a classification limited solely to a consideration of the ultimate utilities operating cost. It is the consumer who will bear the ultimate economic impact of the charge. The increased rate will presumably be passed on by the apartment owner to the tenants, either in the form of increased rent or otherwise. The results seem eminently fair. *Mullenix* at 559-560.

Appellants are treated as other residential or commercial residents in the City. L.F. 977. Appellants are not part of a suspect classification and have no fundamental right that has been impinged by the City. The ordinances complained of have a rational basis in treating each residential dwelling unit in an apartment

complex, trailer park or strip mall as any other individual unit regardless of how many meters service the property. Further, Appellants' allegations that deals were made with certain property owners are unsupported by any evidence produced by Appellants and are refuted by Respondent. L.F. 977, 1009, 122. The ordinances do not result in arbitrary determinations by the City, but as the Court noted in *Mullenix* take account of the ultimate consumer. *Id.*, at 560. Also, the Appellants here all passed the costs on to their tenants. L.F. 624-777, Ex. G, Depositions of King, page 14, Glen Jungmeyer, page 10, Ruiz-Thompson page 12, Killday, page 24, Linda Killday, pages 7-8, Clark, page 23, Bill Koebel, pages 11-14, Dunstan, page 8. Because the ordinances Appellants complain of are rationally related to a legitimate state purpose as noted above, Respondent is entitled to Summary Judgment as to Count V of Appellants' First Amended Petition as a matter of law.

Appellants also claim in Count V of their amended petition that the ordinances are unconstitutional because they do not define and include hotels, motels, nursing homes and the like in the same manner as other multi-unit complexes. However, Missouri courts have stated that an ordinance does not have to define each term, nor does it have to state the underlying rationale for the adoption of the measure and that an equal protection claim does not occur if they do not. *Shepherd vs. City of Wentzville,* 645 S.W.2d 130, at 133 (Mo.App. 1982). Further, a municipality "may classify its users for the purpose of fixing rates....." *Id.*, at 133. In the *Shepherd* case, the plaintiff also claimed the ordinances at issue were unconstitutional because the City of Wentzville included apartment houses

and multi-business office buildings as multi-unit complexes but treated motels, laundromats and nursing homes as single enterprises. *Id.*, at 132. The court upheld the trial court finding that the classification of the multi-complex dwelling differently from motels, laundromats and nursing homes was legal. *Id.*, at 133. It follows then, that Appellants' claims are without merit as to Count V of their petition and that the court did not err in granting Summary Judgment in Respondent's favor as a matter of law and its ruling should therefore have been affirmed by the Western District Court of Appeals.

COUNT VI

Respondent was entitled to summary judgment as to Appellants' alleged violation of Art. III, §40(30) of the Mo. Const. in Count VI of Appellants' First Amended Petition because the ordinances at issue are not special laws of the City of Eldon and Count VI therefore states no genuine issue of material.

The ordinances Appellants complain of apply equally as general ordinances of the City of Eldon. Appendix A-33, A-35, A-38, A-28. Further, Appellants, in Count VI of their First Amended Petition, attempt to claim the ordinances at issue are a special law, apparently because, according to Appellants, they are charged a 2% sales tax on residential property rather than 1% as prescribed by ordinance. However, Appellants fail to raise a genuine issue of material fact because the ordinances at issue do, in fact, properly charge 1%. The additional 1% amount of which Appellants complain is a county tax, not a city tax, and thus is not being charged specially to the Appellants. L.F. 988.

Count VI also appears to attempt to plead that the ordinances at issue amount to a special law based on all of the arguments Appellants have made in their previous five counts. To the extent Count VI pleads as to other than a violation of Article III, Section 40(30) of the Missouri Constitution, Respondent adopts and incorporates by reference its responses herein to Appellants' previous counts. Appendix, A-28. As to Appellants' claims that the ordinances at issue are special laws, Appellants plead no specific facts setting out a claim that the ordinances are special laws. If a statute or ordinance includes all who are similarly situated and there is a reasonable basis for the classification, the statute or ordinance must stand. *Ex Parte Lockhart*, 171 S.W.2d. 660 (Mo.1943). A law is not special if it applies alike to all of a given class and the classification is made upon a reasonable basis. *Abney v. Farmers Mutual Insurance Co. Of Sikeston, 608 S.W.2d 576, 578 (Mo.App.S.D. 1980).* The ordinances here apply equally to single-family and multi-family/commercial users. L.F. 977, 988, 995. As detailed above, the billing of the City's rates has a rational basis and is therefore not arbitrary or discriminatory. As set out above as to Count V of Appellants' First Amended Petition, classifications of all who are similarly situated is not unconstitutional, and was not arbitrary and unreasonable. *Shepard,* 645 S.W.2d. 130, at 133.

Further, the City has a reasonable basis for classifications contained in the ordinances. *Mullenix*, supra. at 559-560, *Shepherd* at 132. Appellants' Count VI is an attempt to employ a provision of law that simply does not apply because the

mandates of Article III, Section 40 are satisfied. Appendix, A-28. Because the ordinances at issue include all who are similarly situated and because there is a reasonable basis for the classifications contained in the ordinances, and because there is no genuine issue of material fact presented by Appellants to the contrary, Respondent was entitled to Summary Judgment as to Count VI of Appellants' petition as a matter of law and the trial court's ruling should have been affirmed by the Western District Court of Appeals.

RESPONDENT'S CONCLUSION REGARDING APPELLANTS' POINT RELIED ON III

In their third point relied on, Appellants note that the lower court in its finding of summary judgment in favor of Respondent did not state in the court's order its reasoning beyond its recognition of Appellants' failure to follow Rule 74.04 in its response. Appellants also note that the lower court is not required to do so, and if it does not do so, it is presumed to be the grounds specified in the movant's motion for summary judgment. *Sherf v. Koster*, 371 S.W.3d, 903, 905 (Mo.App.W.D. 2012).

Appellants next seek to claim that Respondent's Motion for Summary Judgment lacked evidentiary support, in Appellants' opinion, and therefore the lower court judgment should be disregarded and Respondent's motion should be evaluated as if it were a motion for judgment on the pleadings. As Respondent set out in its Brief here, Respondent was in fact entitled to judgment as a matter of law. Appellants' failure to file a proper response under 74.04(c)(2) included not

just Appellants' failure to respond to Respondent's Statement of Uncontroverted Facts, but also included Appellants' failure to support a response to Respondent's Statement of Uncontroverted Facts with discovery, exhibits, affidavits or a brief of its own. Appellants' lack of a response does not now allow it to claim the lower court acted in error by considering and granting judgment upon Respondent's Motion for Summary Judgment. Further, allowing a non-movant to file a motion to strike in lieu of requiring a proper response to a motion for summary judgment when, in the non-movant's opinion, a motion does not meet the criteria of Rule 74.04 would not only moot the requirements of Rule 74.04(c)(2), it would also be directly contrary to the language of Rule 74.04(c)(2) and the substantial case law of the state, which a non-movant is required to follow. Therefore, the April 21, 2015, ruling of the Western District Court of Appeals that a stand-alone Motion to Strike is a response is contrary to the requirements of Rule 74.04 (c)(2) and should therefore, be overturned.

In conclusion, therefore, Respondent prays the relief sought by Appellants here be denied and the judgment of the trial court be affirmed.

Respectfully Submitted,
INGLISH & MONACO, P.C.

By: /s/ Mark G. R. Warren
Mark G. R. Warren #44618
Todd E. Irelan #61304
237 East High Street
Jefferson City, MO 65202
Telephone: 573-634-2522
Facsimile: 573-634-2522
E-Mail: mwarren@inglishmonaco.com
tirelan@inglishmonaco.com
Attorneys for Respondent

IN THE

SUPREME COURT OF MISSOURI

JOAN JUNGMEYER, et al.,	)	
	)	**Supreme Court No. 95069**
Appellants,	)	
	)	
vs.	)	**Court of Appeals, Western**
	)	**District No. WD77922**
	)	
THE CITY OF ELDON,	)	**Miller County Circuit Court,**
	)	**No. 11ML-CC00029**
Respondent.	)	

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Respondent's Substitute Brief complies with the limitations set forth in Rule 84.06(b), as it contains 15,224 words as counted by the Microsoft WORD software used.

Respectfully Submitted,

/s/ Mark G.R. Warren
Mark G. R. Warren, #44618
Todd E. Irelan, #61304
Inglish & Monaco, P.C.
237 East High Street
Jefferson City, MO 65101
Phone: 573-634-2522
Fax: 573-634-4526
Email: mwarren@inglishmonaco.c
tirelan@inglishmonaco.com
ATTORNEYS FOR RESPONDENT

IN THE

SUPREME COURT OF MISSOURI

JOAN JUNGMEYER, et al.,	)	
	)	**Supreme Court No. 95069**
Appellants,	)	
	)	
vs.	)	**Court of Appeals, Western District No. WD77922**
	)	
	)	
THE CITY OF ELDON,	)	**Miller County Circuit Court, No. 11ML-CC00029**
	)	
Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies on behalf of Respondent that one copy of the foregoing Respondent's Substitute Brief was automatically served upon counsel for Appellants by the Supreme Court of Missouri's efiling system, and one bound copy, with an accompanying CD Rom disk scanned for viruses and virus free, was served upon counsel for Appellants via U.S. Mail, on this, the 28th day of September, 2015, as indicated below:

Audrey E. Smollen
Rosenthal Law, LLC
2006 Meadow Lane
Jefferson City, MO 65109
E-mail: aesmollen@embarqmail.com
Attorney for Appellants

Respectfully Submitted,

/s/ Mark G.R. Warren
Mark G. R. Warren, #44618
Todd E. Irelan, #61304
Inglish & Monaco, P.C.
237 East High Street
Jefferson City, MO 65101
Phone: 573-634-2522
Fax: 573-634-4526
Email: mwarren@inglishmonaco.c
tirelan@inglishmonaco.com
ATTORNEYS FOR RESPONDENT